

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

CR. NO. 88-145-C

U.S. DISTRICT COURT
W.D.N.Y.-BUFFALO

-v-

DAVID C. MADAY,

Defendant

GOVERNMENT SENTENCING MEMORANDUM

DENNIS C. VACCO
United States Attorney
502 U.S. Courthouse
Buffalo, New York 14202

MARTIN J. LITTLEFIELD
Assistant U.S. Attorney
of Counsel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA : CR. NO. 88-145-C

v. : (Now joined with 88-35)

DAVID C. MADAY,

GOVERNMENT SENTENCING
MEMORANDUM

Defendant. :

I. BACKGROUND INVESTIGATION

Submitted separately from this Memorandum, but referenced extensively herein, are documents and photographs referred to as "Items" (numbered 1 - 7). These Items constitute various categories of information and/or evidence which the Government believes the Court should consider during the sentencing process.

By 1986, David Maday had been identified by federal investigators as a person who --at a very minimum-- received sexual oriented material involving young adult males. Accordingly, a child pornography sting operation run by the United States Postal Service directed certain correspondence to Mr. Maday from which Mr. Maday ultimately ordered 3 items of child pornography. Upon the controlled delivery of one of the items to Mr. Maday's home, Postal Inspectors executed a search warrant at Mr. Maday's home. The search uncovered hundreds of magazines, photographs and written

materials, all dealing with sexually explicit conduct involving young adult males. Some of the seized materials were definitely of individuals less than 18 years of age, including a written notation by Mr. Maday relative to the undressing of a 7 year old in his residence (see Item 7, Exhibit 269 in the materials simultaneously submitted to the Court). In addition to the hundreds of commercial magazines and photographs possessed by Mr. Maday, investigators also uncovered a series of polaroid pictures which were clearly taken inside Mr. Maday's home and which had notations about the age of the various individuals (see Item 7 Exhibits 272-279).

Investigators also uncovered a Sex Orgy Registry (Item 7, Exhibit 286) which lists various individuals, their ages and the type of sexual activity in which they engaged with Mr. Maday. It is worth noting that one of the individuals (Bob Stearns) has an address of "Be-A-Friend". "Be-A-Friend" is an organization in the City of Buffalo for which various adults become "big brothers" to young boys. According to the evidence that was seized, Mr. Maday was very active in this organization. In addition to the Sex Orgy Registry there was also seized a number of other handwritten notes regarding sexual activity by Mr. Maday (Item 7, Exhibit 264-271).

Investigators also seized a file folder marked "NAMBLA" (North American Man Boy Love Association) [Item 7, Exhibit 287]. This organization basically stands for the proposition that sexual

activity between men and boys is both appropriate and should be encouraged . Investigators also uncovered a 3-ring note book (Item 6, Exhibit 263) which is Mr. Maday's collection of newspaper clippings and various advertisements regarding sexual activity involving children.

As can be seen from the Government's Exhibit List (Item 4), Maday had hundreds of magazines involving young adult males engaged in various sex acts. The Government would have submitted proof that some of those individuals were less than 16 years old (including one NYC victim of such materials). Enclosed is only one of the hundreds of magazines which were seized (Item 7, Exhibit 201), however it is the magazine for which Mr. Maday actually pled guilty (one of the persons photographed in the magazine was definitely identified as being 15 years of age at the time of the photograph). As previously indicated, there are hundreds of magazines like this one plus commercially produced groups of photographs plus Maday's own polaroids all of which were found in Maday's residence at the time the search warrant was executed. A review of the Government's Exhibit List (Item 4) provides ample indication of the type and the number of magazines/photographs seized. (Please note: Exhibits 281 through 284 are 4 boxes containing hundreds of additional magazines which were not specifically named in the Indictment but which the Government had intended to use during the course of the trial to show the defendant's state of mind.)

A summary of the Items being submitted to the Court follows:

Item No. 1 is the original affidavit for the search warrant which investigators utilized to obtain entry to Mr. Maday's home. It explains the underlying investigation and the reasons why Mr. Maday was chosen by that investigation.

Item No. 2 is an inventory of items seized pursuant to the search warrant, broken down into the location of the items.

Item No. 3 is the Indictment returned against Mr. Maday (this includes Item 3a which was another Indictment which was joined to Item 3). Under the plea agreement (Item 3b), Mr. Maday pled guilty to only one count in the Indictment but he acknowledged that the Government may present the Court all information/evidence which the Government has available relative to Mr. Maday's background and activity.

Item No. 4 is the Exhibit List discussed above.

Item No. 5 is a portion of the Government's Pretrial Memorandum of Law submitted during the Suppression Motions. It is being submitted for the Statement of Facts contained therein.

Item No. 6 (also Exhibit 263) is the child/sex 3-ring notebook seized from the defendant,s home.

Item No. 7 is a series of marked Exhibits including the "Sex Orgy Registry" (Exhibit 286), various handwritten notes about sexual activity including a 7 year old (Exhibits 264 - 271), the NAMBLA folder (Exhibit 287), Maday's collection of polaroid photos taken in his home of naked young adult males (Exhibits 272 - 279), the child pornography magazine charged in Count IX to which the defendant pled guilty -- all having been seized from the defendant's home.

II. DR. MAZUR'S REPORT

While these comments can not address the professional qualifications of Dr. Mazur, some of his factual conclusions must

be discussed. Dr. Mazur emphasizes Mr. Maday's homosexual/heterosexual tendencies and seems to downplay Maday's more recent documented interest in teenage boys; Dr. Mazur concludes that Maday's "homosexual behavior occurred primarily between 1970 and 1977". This conclusion ignores the handwritten and photographic materials seized in Maday's home and also ignores Maday's 1986 order for child pornography from the undercover investigation. In Item 6 (the 3-ring notebook which includes the newspaper collection), most of the articles are from 1984 and 1985; the articles (most of which report adult sexual activity with children) are carefully cut and pasted and are interspersed with other photographs of children and with notations by Maday referring to "pre-pube" or outlining a 2 hour sexual itinerary with an 11 year old; the 3-ring notebook also includes a sex magazine entitled "HARD BOYS", a video cover entitled "BOYS ON FILM", a photographic booklet entitled "OH, BOY" and numerous other materials referencing "boys". Dr. Mazur also ignores the "Sex Orgy Registry" (Item 7, Exhibit 286) in which Mr. Maday recorded his sexual conquests of young males, including activity in 1978, 1979, 1980, 1981 and 1984. Dr. Mazur also ignores the NAMBLA ("North American Man Boy Love Association") folder (Item 7, Exhibit 287) which includes seven NAMBLA publications from 1983 - 1984. Dr. Mazur also ignores the polaroid photographs taken by Maday in his house of young males (aged 17 to 22, according to notations on the envelopes) in various sexual poses. Dr. Mazur also ignores the sheets of notes made by Maday (Item 7, Exhibits 264 - 271) describing other sexual

conquests (including a 7 year old), one such note being dated "10/1/84". In short, Dr. Mazur makes a conclusion as to Maday's "homosexual" tendencies as occurring "primarily between 1970 and 1977" which is unequivocally refuted by the materials seized in Maday's home. This fallacious conclusion obviously undermines any other conclusions which Dr. Mazur might draw as to Maday's pre-occupation with boys.¹

The Government is not assailing nor stressing Maday's predilection for adult homosexual or heterosexual activity. The Government does wish to emphasize the overwhelming evidence showing Maday's increasing interest in boys. Maday's own notes, his newspaper collection, his polaroid photographs, his NAMBLA association, his participation in the Buffalo chapter of "Big Brothers" and finally his 1986 order for child pornography from the sting operation, all point to Maday's growing interest in boys during the 1980's. Apparently, Maday is denying such interest and his analyst (Dr. Mazur) is subscribing to this denial. The Government believes the Court must be very careful before allowing society to be exposed to Mr. Maday's predilections, Dr. Mazur's conclusions regarding "pedophilia" notwithstanding.

¹ The Government believes it is significant that at no time during the lengthy delay between the Search Warrant and the plea of guilty (6/19/87 and 1/4/91) did the defendant seek any sort of professional help or guidance--only after he pled guilty.

III. RELEVANT FEDERAL STATUTES AND CASE LAW

The law applicable to these facts has a legislative history which indicates a serious Congressional concern over the proliferation of child pornography in the United States. The present statute (18 U.S.C. §2252) evolved from the Sexual Exploitation Act of 1977, the Child Protection Act of 1984 and several significant rulings by the Supreme Court of the United States. These developments demonstrate an increasing awareness by all branches of government that those who traffic in child pornography contribute to an industry which victimizes innocent children, and that these individuals must be deterred from such conduct.

A. SEXUAL EXPLOITATION ACT OF 1977

The advent of federal laws on child pornography are relatively recent and have undergone significant changes in the past several years. In 1977, Congress passed the Child Sexual Exploitation Act which prohibited the "producing, directing, manufacturing, issuing, publishing, or advertising for pecuniary gain" material depicting minors engaging in sexually explicit conduct. The statute was passed after extensive hearings which involved one Senate and two House subcommittees over ten days and in four cities from May to September of 1977. See Sexual Exploitation of Children, Hrgs. Before the Subcomm. on the Judiciary. U.S. House 95th Cong., 1st Sess. 63 (1977); Sexual Exploitation of Children, Hrgs. Before the Subcomm. on Select Education, Comm. on Education and Labor. U.S.

House, 95th Conc.. 1st Sess. (1977); Protection of Children Against Sexual Exploitation, Hrgs. Before the Subcomm. to Investigate Juvenile Delinquency, Comm. on the Judiciary, U.S. Senate 95th Cong., 1st Sess. (1977).

Congress discovered in its hearings that at that time child pornography was being distributed primarily through a retail market and was part of a widespread lucrative enterprise. Congress' findings were summarized by the Senate Judiciary Committee in its report:

Child pornography and child prostitution have been highly organized, multi-million dollar industries that operate on a nationwide scale. . . .

S. Rep. No. 438, 95th Cong., 1st SEss. 5 (1977).

According to evidence at the hearings, those industries were producing 264 different commercial magazines each month showing children nude or engaged in sexual conduct. Sexual Exploitation of Children Hearings, U. S. House, 95th Cong., 1st Sess., p. 43. Evidence at the hearings revealed that there were 30,000 sexually exploited children in Los Angeles alone, that producers and distributors were earning millions of dollars in the child pornography business and that small children were being kidnapped by pornographers to produce sexually explicit material. *Id.* at pp. 42-43, 59, 117. Child pornography had, in short, become a part of the commercial mainstream of pornography by 1977, sold "over the counter" and in considerable quantities.

Congress' immediate response to the evidence gathered in its 1977 hearings was the passage of the Sexual Exploitation Act of 1977. The Act prohibited the production of any sexually explicit material using children under the age of 16 years, if such material is destined for or had already traveled in interstate commerce. Because the evidence gathered at the hearings centered overwhelmingly on the commercial character of such traffic, Congress understandably directed its prohibitions against the transportation, shipping, mailing, or receipt of child pornography in interstate commerce "for the purpose of sale or distribution for sale." Title 18, United States Code, Section 2252 (1979).

After the 1977 Act, the distribution of child pornography went underground and commercial magazines such as those shown to Congress in 1977 were no longer available "over the counter" in pornography outlets. See Exploited and Missing Children, Hrg. Before the Subcomm. on Juvenile Justice, Comm. on the Judiciary, 97th Cong., 2nd Sess. 47 (1982).

Senate and House hearings between 1982 and 1984 developed evidence demonstrating that with the advent of the 1977 Act, child pornography had become a clandestine, underground effort in which the distribution of child pornography was generally undertaken through individual contacts between individual users - wholesale and retail commercial outlets effectively ceased distribution of this material. Witnesses before House and Senate Committees

explained that under those circumstances, federal enforcement of the 1977 Act was "seriously impaired" by its "for sale" requirements. *Id.* At 39; see also Child Pornography Hrg. Before the Subcomm. on Juvenile Justice, Senate Committee on the Judiciary, 97th Cong., 2nd Sess. (1982).

B. THE SUPREME COURT'S PRONOUNCEMENT IN UNITED STATES V. FERBER

Contemporaneous with Congressional hearings held to determine the appropriate response to the growing clandestine distribution of child pornography, the United States Supreme Court squarely addressed the issue in New York v. Ferber, 458 U.S. 747 (1982). The Court expressly held that the need of society and its children for protection from child pornography is so compelling that any competing First Amendment interest is secondary. Moreover, the Court in Ferber held that child pornography is outside the protection of the First Amendment, whether or not the materials are legally obscene. 458 U.S. at 763-64.

The Ferber Court began by recognizing that "[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem." *Id.* at 749. The Court upheld a New York statute that prohibited the dissemination of material showing children engaged in sexual conduct, whether or not the material was obscene. In so holding, the Court noted that "[i]t is evident beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological well-being of a

minor' is 'compelling.'" Id. at 756-57, quoting Globe Newspaper Co. v. Superior Court. 457 U.S. 596, 607 (1982).

The Court acknowledged that the distribution of child pornography is intrinsically related to the sexual abuse of children in at least two ways:

First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Id. at 158

Finally, the Court found that "[t]he advertising and selling of child pornography provides an economic motive for and are thus an integral part of the production of such materials, and activity illegal throughout the nation." Id. at 761. The Court recognized, then, that the distribution of these materials is a critical link in the chain of child sexual exploitation.

C. THE CHILD PROTECTION ACT OF 1984

After receiving extensive evidence to support the link between child pornography and sexual abuse described by the Supreme Court in Ferber, Congress in May of 1984, approved a broad revision of the 1977 Act. The Child Protection Act of 1984 removed the requirement that interstate trafficking, receipt, or mailing of child pornography be for the purpose of "sale" to be criminal.

Further, it wholly eliminated the "obscenity" restrictions of the 1977 Act, and raised the age limit of protection to 18 years. Provisions raising the amount of potential fines were included as well.

According to Congressional Reports, the new law resulted from Congress' findings that:

- (a) child pornography had developed into a massive nationwide problem;
- (b) runaways and homeless youths are exploited in the production and distribution of pornographic materials; and
- (c) child pornography is "harmful to the physiological, emotional, and mental health of the individual child and to society."

98 Stat. 204, Sec. 2 of Pub.L. 98-292, (May 21, 1984).

In discussing the purposes behind the 1984 Act, the Eleventh Circuit in United States v. Miller, 776 F.d 978 (11th Cir. 1985), observed as follows:

Congress decided that this Act was necessary because existing laws were inadequate to protect against the use of children as prostitutes or as the subject of pornographic materials. S.Rep. No. 95-438, Cong. 2d Sess. 5-6, reprinted in 1978 U.S. Code Cong. & Ad.News 40, 42-3. Congress concluded that child pornography and child prostitution had become a highly organized, multimillion dollar industry operating nationwide; that both the children involved and society in general were being harmed by the industry; and that child prostitution and the sale and distribution of child pornography were being conducted, to a large extent, through the mails and other instrumentalities of interstate and foreign commerce.

In its Report, the House noted:

Perhaps the most important limitation in existing law is the "commercial purpose" limitation. Utilization of 18 U.S.C.,

Section 2252 has been inhibited by that statute's limited application to the distribution of child pornography only for commercial purposes . . . Many of the individuals who distribute materials covered by 18 U.S.C., Section 2252 do so by gift or exchange without any commercial motive and thus remains outside the coverage of the provision. H.R.Rep.No. 98-536, 98th Cong., 1st Sess. 2, reprinted in the 1984 U.S. Code Cong. & Ad.News 492, 493. The Committee concluded that "[s]ince the harm to the child exists whether or not those who initiate or carry out the schemes are motivated by profit, the Subcommittee found a need to expand the coverage of the Act by deleting the commercial purpose requirement.

Id. H.R. Rep. 98-536 at 2-3; 1984 U.S. Code Cong. & Ad.News at 493-94. Id. 776 F.2d at 979.

The revisions of the 1984 Act resulted in a dramatic increase in federal prosecutions. In the first nine months after the passage of the 1984 Act, nearly the same number of people were indicted for federal child pornography offenses as had been indicted during the previous six years. See Child Pornography and Pedophilia. hrgs. Before Perm. Subcomm. on Investigations, Comm. on Governmental Affairs, U.S. Senate. 97th Cong., 2d Sess.: Part I (1984) and Child Pornography and Pedophilia, Hrg. Before the Perm. Comm. on Investigations, Comm. on Governmental Affairs. U.S. Senate. 99th Cong., 2nd Sess., Part II 1985) at 104. The 1984 revisions have clearly enabled federal officials to move against the current source of the child pornography problem, the clandestine and underground sales and exchanges between individuals who have a desire to collect and use materials depicting children engaged in sexually explicit conduct.

Statistics compiled since the 1984 Act dramatically confirm

the direct link between child pornography and sexual molestation of children identified by Congress and the Supreme Court. After 14 months of exhaustive study, including hundreds of hours of testimony from experts and citizens in ten different states and cities, the Attorney General's Commission on Pornography released its Final Report in July 1986. The commissioners included professors of psychiatry and law from the University of Virginia Medical School and Law School, the University of Michigan Law School, and Columbia University, the Editor-in-Chief of "Women's Day" magazine, a U.S. District Court Judge, and other well known professionals.

After reviewing nearly all available research, and receiving testimony throughout the nation from victims, law enforcement officers, psychiatrists, and others providing input from all sides on the child pornography problem, the Commission unanimously concluded in its Final Report that "the greatest bulk of child pornography is produced by child abusers themselves in largely 'cottage industry' fashion, and thus child pornography must be considered as substantially inseparable from the problem of sexual abuse of children." Final Report of the Attorney General's Commission on Pornography, at p. 68. Among the specific problems associated with child pornography which the Commission unanimously identified were:

1. Child pornography represents the permanent record of sexual abuse of the child which follows the child up to and through adulthood.

2. There is substantial evidence that photographs of children engaged in sexual activity are used by child molesters to further molest other children. They are used by sexual molesters (pedophiles) to break down the inhibitions of children in order to persuade them to engage in sex acts.

3. Those who seek these materials create a market for those who sexually molest children in the production of these photographs.

Id. at 68. The Final Report of the Commission concluded by noting "the inseparable relationship between child pornography and child abuse" and by emphasizing that "to take child pornography more seriously is to take sexual abuse of children more seriously, and vice versa." Id. at 70. The Commission concluded from the evidence it heard that preferential child abusers or pedophiles "collect child pornography and or erotica almost as a matter of course" and that child pornography serves the "perpetrator's own needs and is also useful for lowering the inhibitions of other children being recruited by the perpetrator." Id. at 134-35.

D. THE SUPREME COURT'S PRONOUNCEMENT IN OSBORNE V. OHIO

The United States Supreme Court recently found constitutional an Ohio statute proscribing the possession and viewing of child pornography thus supporting the findings set out above. In Osborne v. Ohio, ____ U.S. ____; 110 S.Ct. 1691; 58 U.S.L.W. 4467 (1990), Justice White writing for a six judge majority approved of the child protection rationale underlying the Ferber decision. Justice White further observed:

". . . It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."

". . . [T]he materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. . . . The State's ban on possession and viewing encourages the possessors of these materials to destroy them. . . . [E]ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."

There appears to be a decided national consensus that the trafficking in child pornography is a serious crime which must be aggressively dealt with in our system of criminal justice.

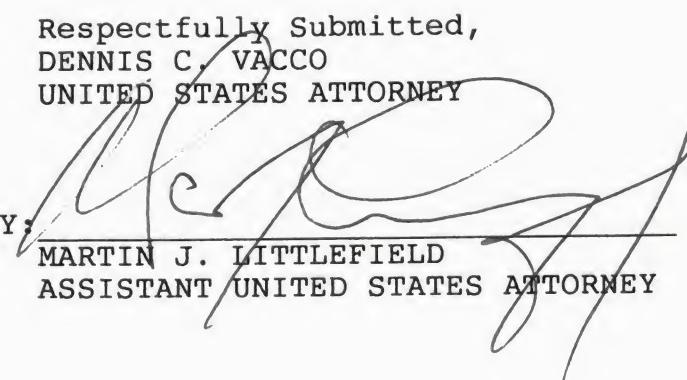
IV. CONCLUSION

The defendant should be held accountable at bar for his willingness to contribute to the industry of child pornography. He enthusiastically entered into a greater-than-arm's length transaction with what he believed to be a foreign distributor of child pornography. He possessed his own cache of child pornography

which predates this investigation.

The defendant's behavior exceeds his stated fleeting curiosity of the sexually bizarre; he eagerly sought a relationship with what he believed to be a distributor of child pornography; more importantly, he actively solicited children and young adult males into his home for sexual purposes and photographing of them in sexually explicit poses.

Dated: Buffalo, N.Y.
September 4, 1991

Respectfully Submitted,
DENNIS C. VACCO
UNITED STATES ATTORNEY

BY:
MARTIN J. LITTLEFIELD
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE BY MAIL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA : CR. NO. 88-145-C
v. :
DAVID C. MADAY, :
Defendant. :

The undersigned hereby certifies that she is an employee of the United States Attorney's Office for the Western District of New York and is a person of such age and discretion as to be competent to serve papers.

That on September 4, 1991, she served a copy of the attached GOVERNMENT SENTENCING MEMORANDUM by placing a copy in a post-paid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States mail at the United States Post Office and Courthouse Building, Niagara Square Station, New York 14202.

ADDRESSEE: Mark J. Mahoney, Esq.
1620 Statler Towers
Buffalo, New York 14202


DARLENE F. SHAUL